No. 73-977

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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

VIRGIL R. JOBE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, is unconstitutionally vague, (2) that the district court abused its discretion in denying his motion for a change of venue due to alleged pre-trial publicity, and (3) that he was entrapped as a matter of law.

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted on nineteen counts of selling prescriptions for controlled substances, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of three years' imprisonment and fined $3,000. The court of appeals affirmed (Pet. App. B, A3-A7).

During the period from October 24, 1972 to November 7, 1972, seven law enforcement officers acting in under-

cover capacities purchased prescriptions for biphetamines and dexoxyn from petitioner, a practicing physician, by going to his office, requesting prescriptions for such things as the "little black ones" (Tr. 64, 68), "RJS capsule" (Tr. 19), "L.A. Turnarounds" (Tr. 99), "Black Mollys" (Tr. 94), and "Biphetamine 20s" (Tr. 126), and paying a fee. All of the officers testified that petitioner did not give them any physical examination or establish any other doctor-patient relationship with them prior to issuing the prescriptions. The prescriptions were often for large quantities of drugs. Some of the officers were able to obtain two or three prescriptions on the same day (Tr. 43, 98-100, 113-114).

1. Petitioner contends that the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801 *et seq.*, is unconstitutionally vague in its application to physicians (Pet. 10-11). The statute is not vague. 21 U.S.C. 841(a)(1) provides that "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly and intentionally to * * * distribute, or dispense, * * * a controlled substance." 21 U.S.C. 823(f) requires "practitioners" to register before dispensing controlled substances. 21 U.S.C. 822(b) provides that persons, like petitioner, who are registered to distribute controlled substances may do so only "to the extent authorized by their registration and in conformity with the other provisions of this subchapter," and 21 U.S.C. 802(20) authorizes registered physicians to distribute controlled substances, only "in the course of professional practice or research." See also 21 U.S.C. 802(10).

It is clear from these provisions of the Act that, as the judge instructed the jury (Tr. 324-326), a physician is not authorized to give prescriptions for controlled substances outside the scope of his professional practice and that if he does so he is guilty of unlawful distribution

within the meaning of 21 U.S.C. 841(a)(1). See 21 C.F.R. 306.04; *United States* v. *Badia*, No. 73-1171, decided *per curiam* December 27, 1973 (C.A. 1). See, also, *United States* v. *Bartee*, 479 F. 2d 484 (C.A. 10).

Similar statutory provisions were approved in *Jin Fuey Moy* v. *United States*, 254 U.S. 189, 194:

> Manifestly the phrases "to a patient" and "in the course of his professional practice only" are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug. A "prescription" issued for either of the latter purposes protects neither the physician who issues it nor the dealer who knowingly accepts and fills it.

The proscriptions of the statute here involved are therefore sufficiently precise and definite to meet due process standards.[1]

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[1]The indictment charged petitioner with "distributing" these drugs (Tr. 324). The Fifth Circuit has held that such an indictment is defective because where a physician is accused of writing prescriptions for controlled substances outside the course of his professional practice he can be indicted only for unlawful "dispensing". *United States* v. *Leigh*, No. 73-1615, decided November 8, 1973 (C.A. 5). The court reached this conclusion by holding that 21 U.S.C. 802(10), which states that "[t]he term 'dispense' means to deliver a controlled substance to an ultimate user * * * pursuant to the lawful order of a practitioner, including * * * prescribing," when read with 21 U.S.C. 802(11), which states "[t]he term 'distribute' means to deliver (other than by administering or dispensing) a controlled substance," meant that a "practitioner" could not be indicted for unlawfully "distributing" drugs.

2. Petitioner urges that the court abused its discretion in refusing to grant his motion for a change of venue due to alleged pre-trial publicity. The court denied the motion subject to reconsideration after the *voir dire* examination of the prospective trial jurors. At the time of the trial petitioner did not exhaust his peremptory challenges and questioned only one prospective juror (Tr. 5-9). That juror stated that he had heard two jurors in the jury assembly room discuss the fact that petitioner had another appeal pending (Tr. 5-6). However, he stated he had not heard anything on the radio or read anything in the papers about the instant case (Tr. 7) and that he had disregarded the other juror's comment (*ibid.*). The jury was then empanelled with this juror on it (Tr. 8). Immediately thereafter, upon being questioned by the judge, petitioner stated he was satisfied with the jury and waived all other challenges (*ibid.*). Petitioner thereupon renewed his motion for a change of venue (Tr. 10), which was denied.

As the court below correctly ruled (Pet. App. B, A5-A6), where it appears from *voir dire* that the jurors are impartial it is not an abuse of discretion for the judge to refuse a change of venue due to publicity. See Rule 21, Fed.R. Crim.P. Moreover, the failure of petitioner to

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The First Circuit has disagreed, holding in *United States* v. *Badia, supra,* that where a practitioner gives a prescription outside the course of his professional conduct he is not dispensing but is unlawfully distributing within the meaning of 18 U.S.C. 841. On the other hand, the Tenth Circuit has treated indictments alleging either unlawful "distribution" or "dispensing" as sufficient. Compare *United States* v. *Bartee, supra,* with the instant case. However, petitioner does not attack the sufficiency of his indictment but merely contends that the statute is too vague to cover the conduct in which he engaged, a contention rejected by all three of these circuits. Moreover, the disagreement among the circuits on this narrow issue is not of sufficient significance to warrant review by this Court.

exhaust his peremptory challenges or to question prospective jurors suggests that the allegation of pre-trial publicity was insubstantial. See *United States* v. *Moran*, 236 F. 2d 361 (C.A. 2), certiorari denied, 352 U.S. 909; *Allen* v. *United States*, 4 F. 2d 688 (C.A. 7), certiorari denied *sub nom. Hunter* v. *United States*, 267 U.S. 597.[2]

3. Finally, petitioner contends he was entrapped as a matter of law because the agents who purchased controlled substances from him used aliases and fictitious chauffeurs' licenses. However, as this Court has repeatedly held, "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises." *Sorrells* v. *United States*, 287 U.S. 435, 441. In *United States* v. *Russell*, 411 U.S. 423, 435-436, this Court recently stated in rejecting a similar contention:

> Nor will the mere fact of deceit defeat a prosecution, see, *e.g.*, *Lewis* v. *United States*, 385 U.S. 206, 208-209 (1966), for there are circumstances when the use of deceit is the only practicable law enforcement technique available. It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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[2]As the court of appeals ruled (Pet. App. B, A7), petitioner's contention that Rule 30 of the Rules of the United States District Court for the Western District of Oklahoma denied him a fair trial because it allowed the jury to be selected from only one of the divisions of the district was not raised prior to trial or during jury selection and therefore cannot be raised now.